Washington Law Review

Volume 70 | Number 2

4-1-1995

Washington Courts Get Stingy: Improper Denial of Attorney's Fees under 42 U.S.C. §§ 1983 and 1988

Brian Buckley

WASHINGTON COURTS GET STINGY: IMPROPER DENIAL OF ATTORNEY'S FEES UNDER 42 U.S.C. §§ 1983 AND 1988

Brian Buckley

Abstract: 42 U.S.C. §§ 1983 and 1988 allow persons to challenge state laws that violate their federal constitutional rights and to recover their attorney's fees should they prevail. This Comment analyzes two recent Washington cases in which the plaintiffs were denied fee recoveries despite having successfully challenged state statutes. This Comment then argues that fee awards should have been granted in both cases and that in the future fee awards should rarely be denied when plaintiffs invalidate state law under §§ 1983 and 1988.

Both 42 U.S.C. §§ 1983 and 1988 are crucial tools for preserving individual rights secured by the Constitution and laws of the United States. Section 1983 establishes a federal cause of action for deprivation of civil rights under the auspices of state authority. Section 1988 is an adjunct to § 1983 and other federal civil rights laws and allows a prevailing civil rights litigant to recover reasonable attorney's fees.

Congress has recognized that the effective vindication of civil rights depends substantially on private enforcement.[1] Congress enacted § 1983 to empower persons to act as "private attorneys general" to ensure that state civil rights violations are challenged and corrected.[2] To assist such an effort, the fee shifting provisions under § 1988 allow the private litigant to bring a civil rights challenge despite the prohibitive cost of protracted litigation.[3] Together, these statutes also deter the violation of constitutional rights by state authorities. The dual goals of vindication and deterrence have long been recognized in the legislative history of civil rights legislation and the corresponding case law.

In 1994, two high-profile Washington cases, *Soundgarden v. Eikenberry*[4] (*Soundgarden*) and *Thorsted v. Gregoire*[5] (*Thorsted*), involved constitutional challenges to state statutes under 42 U.S.C. § 1983. In both cases, the prevailing plaintiffs were denied recovery of their attorney's fees under 42 U.S.C. § 1988 despite the established purposes of §§ 1983 and 1988.

---

1. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.
2. *Id.*
3. *Id.*
4. 123 Wash. 2d 750, 871 P.2d 1050 (1994), *cert. denied*, 115 S. Ct. 663 (1994).
5. 841 F. Supp. 1068 (W.D. Wash. 1994).

This Comment analyzes the application of §§ 1983 and 1988 in *Soundgarden* and *Thorsted*. Part I briefly summarizes the histories of §§ 1983 and 1988 and the goals those sections were intended to serve. Part II analyzes *Soundgarden* and *Thorsted*, respectively, and argues that the denial of attorney's fees was improper in both cases. Finally, part III discusses the policies that should guide the future application of §§ 1983 and 1988 by Washington courts.

I. THE HISTORIES OF 42 U.S.C. §§ 1983 AND 1988

Both 42 U.S.C. §§ 1983 and 1988 are links in an extended chain of federal civil rights legislation aimed at securing individual constitutional liberties against attacks from all quarters. The histories of these sections reveal that Congress intended them to have an expansive scope and to grant significant power to private litigants.

A. 42 U.S.C. § 1983

"The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights."[6]

Congress originally enacted § 1983 as the first section of The Civil Rights Act of 1871, which was modeled after a section of The Civil Rights Act of 1866.[7] The Civil Rights Act of 1871, alternatively known as the "Ku Klux Act," was a response to the unequal, and often violent, treatment of blacks in the southern states following the Civil War. In particular, southern state governments were not taking steps to curb the mounting power of white supremacist groups, such as the Ku Klux Klan, or to stem the tide of civil rights violations against blacks and white sympathizers.[8]

The civil rights acts of the late nineteenth century were a federal attempt to vindicate constitutional rights when the states had failed to do so.[9] The U.S. Supreme Court has stated that the section that became § 1983 was intended to provide a federal remedy for violations, under the

6. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

7. 1 Bernard Schwartz, *Statutory History of the United States: Civil Rights* 591 (1970).

8. *Id.*

9. *Mitchum*, 407 U.S. at 239.

authority of state law, of rights secured by the Constitution and laws of the nation.[10] Currently, 42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[11]

In addition to providing the means to vindicate civil rights, § 1983 is also intended to *deter* unconstitutional state action.[12] The U.S. Supreme Court has stated that the purpose of § 1983 is to deter state actors from using their authority to deprive individuals of their federally guaranteed rights and to provide relief if that deterrence fails.[13] The deterrent effect of § 1983 resides in the message that constitutional violations will not go unchallenged and may result in substantial monetary awards.

The Supreme Court also has stated that § 1983 should be interpreted broadly to address all forms of state violation of federally protected rights.[14] Further, the Court has made it clear that unconstitutional state action may be challenged whether that action is executive, legislative, or judicial in nature.[15] As a consequence of the expansive scope and broad application of 42 U.S.C. § 1983, it has become, in the words of former Justice Powell, the "most explosive source of Federal jurisdiction."[16]

---

10. *Id.* at 239.

11. 42 U.S.C. § 1983 (1988).

12. Wyatt v. Cole, 112 S. Ct. 1827, 1830 (1992).

13. *Id.* at 1830.

14. Monell v. New York City Dep't of Social Serv., 436 U.S. 658, 700–01 (1978).

15. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

16. Lewis F. Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (Nov. 1982).

B. 42 U.S.C. § 1988

> *"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances."*[17]

Congress enacted 42 U.S.C. § 1988 in 1976 as the Civil Rights Attorney's Fees Awards Act.[18] The relevant portion of the statute reads as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[19]

This section thus grants the federal courts discretion to award attorney's fees to parties who obtain relief under any of the civil rights laws enacted since the end of the Civil War.[20]

The enactment of § 1988 was a direct response by Congress to the U.S. Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.[21] In that case, the Court held that Congress alone had the power to declare which federal laws would support an award of attorney's fees.[22] The decision appeared to disallow fee awards under statutes which lacked express authorization for such awards. Congress responded by making fee awards appropriate for all civil rights legislation.

The primary purpose of § 1988 is to provide the private litigant access to the legal process. Congress has stated, "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which

---

17. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citation omitted).

18. Pub. L. No. 94-559, 90 Stat. 2641 (1976).

19. 42 U.S.C. § 1988(b) (1988).

20. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909. *See infra* note 67 for a discussion of what renders a party "prevailing" for the purposes of a fee award.

21. 421 U.S. 240 (1975). *See* 1976 U.S.C.C.A.N. 5908, 5909.

22. *Alyeska*, 421 U.S. 240, 262 (1975). In *Alyeska*, the Court stated, "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.*

these laws contain."[23] The access provided by § 1988 is practical. Although § 1983 and other civil rights laws allow citizens theoretical access to the courts, § 1988 dismantles the actual prohibitive hurdle posed by the cost of legal representation.

Congress also intended § 1988 to encourage competent attorneys to represent clients with civil rights claims through the promise of a full recovery of fees.[24] At least one court has also held that attorneys should be rewarded through fee recovery for accepting novel or challenging civil rights litigation.[25]

The scope and goals of § 1988, like those of § 1983, are broad and demand liberal application. Congress has mandated that courts use the most expansive and effective remedies available to enforce the civil rights laws.[26] Consequently, the U.S. Supreme Court has held that awards of attorney's fees under civil rights legislation, such as § 1983, are to be the rule, rather than the exception.[27]

II. ANALYSIS OF *SOUNDGARDEN* AND *THORSTED*

The legislative and legal histories of 42 U.S.C. §§ 1983 and 1988 make it clear that attorney's fees are to be liberally granted in civil rights actions and that private civil rights litigants are to be both encouraged and assisted in their efforts. However, two recent cases in Washington have flouted the purposes of §§ 1983 and 1988 by searching for reasons to deny, rather than grant, attorney's fees.

Soundgarden v. Eikenberry[28] invalidated as unconstitutional Washington's Erotic Music Statute, which regulated the dissemination of sexually explicit material to minors.[29] The court refused to recognize the plaintiffs' § 1983 claim or address the issue of attorney's fees because the unconstitutional statute at issue had never been enforced.[30] *Thorsted v. Gregoire*[31] struck down as unconstitutional a state ballot access statute, which established term limits for Washington members of the United

23. 1976 U.S.C.C.A.N. 5908, 5910.

24. *Id.* at 5913.

25. Johnson v. Georgia Highway Express, 488 F.2d 714, 718 (5th Cir. 1974).

26. 1976 U.S.C.C.A.N. 5908, 5910–11.

27. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

28. 123 Wash. 2d 750, 871 P.2d 1050 (1994), *cert. denied*, 115 S. Ct. 663 (1994).

29. Wash. Rev. Code §§ 9.68.050–.070, .090 (1994).

30. *Soundgarden*, 123 Wash. 2d at 776, 871 P.2d at 1064.

31. 841 F. Supp. 1068 (W.D. Wash. 1994).

States Senate and House of Representatives. The court recognized the plaintiffs' § 1983 claim, but denied attorney's fees under § 1988 based on special circumstances which would have rendered a fee award unjust.[32] This section analyzes *Soundgarden* and *Thorsted* and argues that, in both cases, precedent and policy warranted an award of reasonable attorney's fees to the plaintiffs.

A. Soundgarden v. Eikenberry*: Misapplication of § 1983*

1. Case History

In 1992, the Washington legislature passed the Erotic Sound Recordings statute,[33] which amended a prior statute governing the distribution of obscene materials to minors. The Erotic Sound Recordings statute, known alternatively as the Erotic Music Statute, defines erotic material and prohibits the display and distribution of such material to minors. The 1992 amendment added sound recordings to the list of material which may be judged erotic, a list that previously consisted of exclusively visual material.

Prior to any enforcement of the Erotic Music Statute, a suit was filed in superior court to challenge the constitutionality of the new law. The plaintiffs in the suit consisted of musical groups, recording companies, record stores, and private persons, represented by the recording group Soundgarden.[34] The plaintiffs alleged that the Erotic Music Statute violated their rights of free speech and due process, guaranteed by the state and federal constitutions, and sought declaratory and injunctive relief.[35] Plaintiffs brought suit under the Washington Declaratory Judgment Act[36] and 42 U.S.C. § 1983, and specifically sought an award of attorney's fees under 42 U.S.C. § 1988.[37]

The superior court found the Erotic Music Statute unconstitutional and enjoined its enforcement by the defendants, the State Attorney General and County Prosecutor.[38] The court held that the statute violated the

32. *Id.* at 1084.

33. Wash. Rev. Code §§ 9.68.050–.070, .090 (1994).

34. *Soundgarden*, 123 Wash. 2d at 753, 871 P.2d at 1052.

35. *Id.* at 754, 871 P.2d at 1053.

36. Wash. Rev. Code § 7.24. Wash. Rev. Code § 7.24.020 provides that a person "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under [it]."

37. *Soundgarden*, 123 Wash. 2d at 754, 871 P.2d at 1053.

38. *Id.* at 753, 871 P.2d at 1052.

plaintiffs' right to free speech by causing artists to censor the content of their music in order to avoid criminal prosecution.[39] Unchallenged plaintiffs' affidavits established a pervasive chilling effect on expression, affecting the individual plaintiffs' ability to produce, distribute, or acquire certain forms of protected speech.[40] Additionally, the court held that the statute violated due process.[41] Despite acknowledging that the plaintiffs' constitutional rights had been violated, the court declined to award attorney's fees, reasoning that the case was brought under the Washington Declaratory Judgment Act,[42] which did not provide for such fees.[43]

In 1994, the Washington Supreme Court affirmed the rulings of the trial court on the unconstitutionality of the Erotic Music Statute and its denial of attorney's fees.[44] In its discussion of the fee issue, the court recognized respondents' argument that the discretion to deny fees under § 1988 is extremely narrow.[45] However, it went on to state that an individual's civil rights must be infringed before suit may be brought under 42 U.S.C. § 1983. The court held that, because neither the Attorney General nor County Prosecutor had ever tried to enforce the Erotic Music Statute, no infringement had occurred.[46] To support its proposition, the court cited five Washington cases brought under § 1983, stating that in each case "a governmental entity or official had sought to enforce a statute, ordinance or policy prior to being sued . . . ."[47] The court entered a ruling under the state Declaratory Judgment Act and never reached the specific issue of whether attorney's fees were appropriate under § 1988.

2. *The Court Should Have Applied § 1983*

The court's failure in *Soundgarden* to recognize the plaintiffs' claim under § 1983, despite the existence of a present and pervasive

39. *Id.* at 755, 871 P.2d at 1053.

40. *Id.* at 763, 871 P.2d at 1057.

41. *Id.* at 755, 871 P.2d at 1053.

42. The case does not address why rights which are sufficiently "affected" to allow suit under the Declaratory Judgment Act are not "infringed" for the purposes of § 1983.

43. *Soundgarden*, 123 Wash. 2d at 756, 871 P.2d at 1053.

44. *Id.* at 753, 871 P.2d at 1052.

45. *Id.* at 776, 871 P.2d at 1064. The respondents were quoting Herrington v. County of Sonoma, 883 F.2d 739, 743 (9th Cir. 1989)).

46. *Id.*

47. *Id.* at 776 n.76, 871 P.2d at 1064 n.76.

constitutional deprivation, is in conflict with precedent, as well as the spirit and purpose of 42 U.S.C. §§ 1983 and 1988. Contrary to the court's decision, it is established that suit may be brought under § 1983, and fees awarded under § 1988, despite the fact that the offending statute has never been enforced.

a. United States Supreme Court Precedent

Decisions of the Supreme Court of the United States support the ability of a private litigant to challenge a statute or ordinance under 42 U.S.C. § 1983 prior to enforcement of the law. In *Virginia v. American Booksellers Ass'n* (*American Booksellers*),[48] the Court invalidated a "harmful to minors" statute that was functionally similar to the Erotic Music Statute in *Soundgarden*.[49] Suit was brought under 42 U.S.C. § 1983, despite the fact that the statute in question had never been enforced. The state officials defended the action on the ground that no infringement of civil rights had occurred, in harmony with the reasoning of the *Soundgarden* court.[50]

In rejecting the defendants' claim that no infringement had occurred, the Supreme Court stated that it was not troubled by the pre-enforcement nature of the suit.[51] The Court referred to the fact that the plaintiffs had demonstrated a real and reasonable fear that the statute would be enforced against them, and there was no evidence to suggest that it would not.[52] More importantly, the statute in *American Booksellers* was found to be in violation of the plaintiffs' constitutional rights of free speech and expression. The Court stated that the primary danger of the statute was self-censorship, a harm that can accrue without an actual prosecution.[53] The Supreme Court recognized that pre-enforcement censorship, like that suffered by the plaintiffs in *Soundgarden*, will support a civil rights challenge under § 1983.

A similar result was reached in *Texas State Teachers Ass'n v. Garland Independent School District*,[54] where the Court invalidated a school

48. 484 U.S. 383 (1988).

49. The Virginia statute prohibited persons from openly displaying, for commercial purposes, visual or written material that was sexually explicit and thus harmful to juveniles. *Id.* at 386.

50. *Id.* at 392–93.

51. *Id.* at 393.

52. *Id.*

53. *Id.*

54. Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782 (1989).

district regulation under 42 U.S.C. § 1983, although the offending section of the regulation had never been enforced. The portion of the regulation that the Court found to be unconstitutional prohibited certain communications between teachers using school mail or public address systems. No teacher had been disciplined under the rule, but the Fifth Circuit stated that the rule nevertheless chilled teacher speech in violation of the First Amendment.[55] The Supreme Court affirmed that this pre-enforcement chilling was sufficient to support the § 1983 claim.[56]

It is clear from Supreme Court rulings that the chilling of free speech that an unconstitutional state law may occasion, even prior to its enforcement, infringes civil rights by encouraging self-censorship. In addition, a number of circuit and district court cases have rejected the reasoning used by the court in *Soundgarden* and allowed § 1983 claims prior to enforcement of the offending state law.[57]

---

55. Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046, 1055 (5th Cir. 1985), *aff'd*, 489 U.S. 782 (1989).

56. *Garland*, 489 U.S. at 793.

57. *In re* Kansas Cong. Dists. Reapportionment, 745 F.2d 610 (10th Cir. 1984), involved a challenge under 42 U.S.C. § 1983 to congressional districts in the state of Kansas. Although the defendant Secretary of State had never enforced the districts, the trial court found the districts unconstitutional and awarded the plaintiffs their attorney's fees under 42 U.S.C. § 1988. The defendants appealed to the Tenth Circuit, proffering the theory relied upon by the court in *Soundgarden*, that, absent enforcement, the unconstitutional districts could not infringe the plaintiffs' civil rights.

In rejecting the defendants' argument, the Tenth Circuit held that a threat to a plaintiffs' constitutional rights was sufficient to support a claim under § 1983. *Id.* at 612. The court emphasized that the Secretary of State was the official responsible for enforcing the congressional districts and that the plaintiffs were not required to accept his promise that enforcement would never occur. *Id.* The plaintiffs prevailed and were subsequently awarded fees under § 1988.

A pre-enforcement challenge to a state statute under § 1983 was also recently allowed in federal district court in Washington. Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994), the other case discussed in this Comment, involved a challenge to a state ballot access statute. The defendant Secretary of State and Attorney General relied on the fact that the statute had never been enforced in arguing that plaintiffs' § 1983 claim should not be allowed. The court rejected this argument, stating, "threatened harm that has not yet occurred, but that will occur unless judicial relief is afforded, is enough to support a civil rights claim." *Id.* at 1083 (citation omitted). Although fees were denied under § 1988 on other grounds, the court recognized the plaintiffs' § 1983 claim and applied a full analysis under § 1988.

See also Auburn Police Union v. Carpenter, 8 F.3d 886 (1st Cir. 1993); Sequoia Bookstore, Inc. v. Ingemunson, 901 F.2d 630 (7th Cir. 1990); Sable Communs. of California, Inc. v. Pacific Tel. & Tel. Co., 890 F.2d 184 (9th Cir. 1989); Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati, 822 F.2d 1390 (6th Cir. 1987); Septum, Inc. v. Keller, 614 F.2d 456 (5th Cir. 1980). All of these cases recognized the viability of pre-enforcement challenges under 42 U.S.C. § 1983.

The five Washington cases cited by the *Soundgarden* court to support its holding involved laws which had been enforced prior to being challenged. None of those cases, however, required that § 1983 claims be predicated on such enforcement.[58]

b. Purpose of 42 U.S.C. § 1983

In addition to contradicting precedent, *Soundgarden*'s holding that private litigants may not seek federal vindication of their civil rights until the unconstitutional state law at issue has been enforced against them, contravenes the recognized function and purpose of § 1983.

A primary purpose of § 1983 is to serve as a shield for individual civil rights.[59] The statute provides a federal remedy for the state occasioned deprivation of any rights or privileges secured by the Constitution and federal laws.[60] The refusal in *Soundgarden* to recognize the plaintiffs' claim under § 1983 is tantamount to an assertion that, absent actual enforcement of an unconstitutional law, no quantum of harm amounts to a deprivation of civil rights.

The plaintiffs in *Soundgarden* alleged a number of specific harms they were suffering under the Erotic Music Statute, despite lack of enforcement. The artists stated that they were forced to censor the content of their music and curtail their creativity in order to avoid loss of sales. Record retailers stated that they had canceled orders for and reduced distribution of records that they suspected might be judged erotic, in order to avoid criminal prosecution. These allegations went unchallenged by the state and were relied upon by the *Soundgarden* court as indicative of a restraint on free speech.[61]

The Erotic Music Statute effectively hindered freedom of speech despite the fact that it had not been officially enforced. It did so by coercing self-censorship, a harm that can result even without an actual prosecution.[62] It caused a curtailment of expression and a concrete loss of revenue. Under *Soundgarden*'s reasoning, however, in the absence of

58. *See* Collier v. Tacoma, 121 Wash. 2d 737, 854 P.2d 1046 (1993); Ryder v. Port of Seattle, 50 Wash. App. 144, 748 P.2d 243 (1987); Duranceau v. Tacoma, 37 Wash. App. 846, 684 P.2d 1311 (1984); Rains v. State, 100 Wash. 2d 660, 674 P.2d 165 (1983); Jacobsen v. Seattle, 98 Wash. 2d 668, 658 P.2d 653 (1983).

59. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

60. 42 U.S.C. § 1983 (1988).

61. Soundgarden v. Eikenberry, 123 Wash. 2d 750, 763, 871 P.2d 1050, 1057 (1994), *cert. denied*, 115 S. Ct. 663 (1994).

62. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988).

the state Declaratory Judgment Act, the plaintiffs would have been without recourse until faced with actual prosecution. In the interim, they would have been forced to endure deprivations of their civil rights, despite the existence of a specific federal remedy in § 1983.

Failure to allow pre-enforcement challenges under § 1983 also undermines the goal of deterrence. One aim of the statute is to deter state legislatures from passing unconstitutional laws.[63] Holding that enforcement is a necessary predicate to a civil rights challenge sends a message to legislatures that an unconstitutional law may still exert profound and pervasive influence with relative impunity, at least until the time of enforcement. In the worst case scenario, such a law coupled with an unspoken policy of non-enforcement could result in protracted civil rights deprivations with no remedy under § 1983. This result is clearly contrary to the intent of § 1983 to address all unconstitutional state action, whether that action is executive, legislative, or judicial in nature.[64] Requiring executive enforcement as a precondition to a § 1983 claim makes it impossible to challenge purely legislative state action.

Lastly, the holding in *Soundgarden* is inconsistent with the broad construction and application that should be applied to § 1983. A primary goal of the statute is to assist the individual in stemming unconstitutional state action before it results in a widespread deprivation of rights.[65] The idea of interposing the federal courts between the states and the people[66] suggests removing barriers to civil rights challenges, rather than erecting them. Requiring enforcement of a state law when it is causing measurable and observable harm to civil rights places a purely technical hurdle in the path of justice.

c. Summary

The complaining parties in the *Soundgarden* case faced both the immediate deprivation of their civil rights through a chilling of their right to free expression, as well as the threat of future prosecution under an unconstitutional statute. The weight of precedent establishes that even the threat of civil rights infringement at the hands of the state, and certainly an immediate harm such as self-censorship, entitles a person to seek vindication under 42 U.S.C. § 1983. Before *Soundgarden*, it was

63. *See* Wyatt v. Cole, 112 S. Ct. 1827, 1830 (1992).

64. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

65. *See* Teitelbaum v. Sorenson, 648 F.2d 1248, 1250 (9th Cir. 1981).

66. *Mitchum*, 407 U.S. at 242.

well-settled federal authority that a person need not await actual enforcement of an unconstitutional law before being empowered to serve the role of private attorney general. The court in *Soundgarden* should have recognized the application of plaintiffs' § 1983 claim and then granted their request for reasonable attorney's fees as prevailing parties.[67]

B. Thorsted v. Gregoire*: Misapplication of § 1988*

1. Case History

In 1992, Washington voters approved Initiative Measure 573, a ballot access statute which amended and made additions to a number of chapters in the Revised Code of Washington.[68] The statute established limits on the number of terms persons might serve in the United States Senate and House of Representatives. The Secretary of State was prohibited from accepting a declaration of candidacy from persons barred by the statute, although they were allowed to run a write-in campaign.[69]

Prior to any enforcement under the term limits statute, suit was filed in federal district court to challenge the constitutionality of the measure. The plaintiffs in the case consisted primarily of registered Washington voters, but they were joined by Thomas Foley, who had represented the Fifth Congressional District of Washington in Congress since 1965. The plaintiffs alleged that the term limits statute violated their rights under the federal Constitution to free association and political expression, and

---

67. The court did not entertain the plaintiffs' claim under § 1983 and, consequently, never applied a full analysis under § 1988. In order to recover attorney's fees under § 1988, a plaintiff must be a "prevailing party" under a federal civil rights law. The U.S. Supreme Court has held that a party prevails if it succeeds on any significant issue in the litigation and achieves some of the benefit it sought in bringing suit. Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792 (1989). To confer prevailing party status, a victory must alter the legal relationship between the parties and modify the defendant's behavior in a way that directly benefits the plaintiff at the time of judgment. Farrar v. Hobby, 113 S. Ct. 566, 573 (1992).

The *Soundgarden* plaintiffs were suffering measurable harm under the Erotic Music Statute, despite lack of enforcement. The court's holding changed the parties' legal relationship and modified the behavior of the defendant state officials by removing their ability to enforce the statute, the very result the plaintiffs hoped to achieve when they filed suit. This result was of immediate and profound benefit to the plaintiffs because it dissolved the chilling of their free speech. Thus, the *Soundgarden* plaintiffs were "prevailing parties" under § 1983 and should have been awarded their attorney's fees under § 1988.

68. Initiative Measure 573 added new sections to chapters 7.16, 29.15, 29.51, 29.68, 43.01, and 44.04 of the Revised Code of Washington in 1994.

69. Thorsted v. Gregoire, 841 F. Supp. 1068, 1071 (W.D. Wash. 1994).

sought declaratory and injunctive relief. As defendants, the Washington Secretary of State and Attorney General were named in their official capacities. In addition to seeking invalidation of the statute under the Constitution, the plaintiffs sought specific relief under 42 U.S.C. §§ 1983 and 1988.[70]

In *Thorsted*, the court found in favor of the plaintiffs and held that the term limits sections of Initiative 573 were unconstitutional. The court found that the statute violated Article I, Section 2 of the Constitution, by adding additional restrictions on membership in the United States House and Senate, which is beyond the power of state government.[71] The court further held that the statute violated the First and Fourteenth Amendments by restricting political opportunity and curtailing freedom of association.[72] The defendants were enjoined from enforcing the term limits portions of the measure.[73] With regard to the plaintiffs' civil rights claim under 42 U.S.C. § 1983, the court stated that the same relief was appropriate as that granted under the constitutional claims.[74]

The *Thorsted* court recognized the plaintiffs' § 1983 claim, despite the pre-enforcement nature of the suit. It held that, because the threatened enforcement would deprive the plaintiffs of their constitutional rights, they were entitled to injunctive and declaratory relief under Section 1983.[75] However, it went on to state that such relief did not guarantee a fee award. The U.S. Supreme Court has stated that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[76] Courts have discretion to award fees under 42 U.S.C. § 1988, and the meaning of "special circumstances" has been left to be developed through case law.[77]

The *Thorsted* court identified seven "special circumstances" that it found counseled against such an award.[78] Furthermore, the court

70. *Id.* at 1072.

71. *Id.* at 1085.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1083.

76. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citation omitted).

77. Teitelbaum v. Sorenson, 648 F.2d 1248, 1249 (9th Cir. 1981).

78. The special circumstances identified by the court were as follows:

1. No award is needed to serve the purpose of Section 1988, which is to assure 'effective access to the judicial process.' *Hensley*, 461 U.S. at 429. This is not a typical civil rights case. The mere filing of suit by anyone with standing would have assured a full court test. *See* the briefs of *amicus curiae*, which demonstrate this.

distinguished contrary authority, relying on the "totality of circumstances" present in the *Thorsted* case, and held that an award of attorney's fees would be "manifestly unfair."[79]

2. *Attorney's Fees Should Have Been Awarded*

The plaintiffs in the *Thorsted* case should have been granted their reasonable attorney's fees under § 1988. The special circumstances identified by the court do not comport with precedent and the purpose of civil rights legislation in general, and § 1988 in particular. The sections that follow analyze each of the court's identified special circumstances in turn.

a. *Award Unnecessary for Effective Access*

The *Thorsted* court's assertion that attorney's fees were unnecessary to assure effective access to the judicial process misrepresents the true role of § 1988. The access which is afforded by the Attorney's Fees Awards Act is practical access, the means by which private litigants can benefit from available remedies.[80] Technical issues, such as the right to bring a civil rights claim or standing to sue, are addressed by federal

---

2. No relief has been won under the Section 1983 claims beyond that already awarded under the constitutional claims.

3. The legislation that prompted the suit was adopted by a voters' initiative, not by State officials. The deterrence purpose of Section 1983, *see Wyatt v. Cole*, 112 S. Ct. 1827, 1830 (1992), is inapplicable.

4. The defendant officials have not yet enforced Initiative 573. Their willingness to do so if it is upheld reflects only the minimum their oaths of office require. *Cf. May v. Cooperman*, 578 F. Supp. 1308 (D.N.J. 1984) (denying attorney fees as against state officials who took no action to enforce an unconstitutional statute, but granting them against state legislators who intervened).

5. The State officials have acted in good faith. 'The Ninth Circuit has ruled that a defendant's good faith is one factor of several that a court may consider in applying the Attorney's Fees Act.' *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981).

6. This is a case of first impression in federal court, and the public interest requires that it be adjudicated through a full adversary process. The State defendants have done nothing to increase the litigation costs beyond what would have been necessary in any event.

7. There was no way for the State officials to settle the case by agreement. Even if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it. State legislation is presumed constitutional until the contrary is shown. *Clements v. Fashing*, 457 U.S. at 963–64.

Thorsted, 841 F. Supp. at 1084 (parallel citations omitted).

79. *Id.* (citation omitted).

80. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

legislation, such as § 1983, or federal case law. The purpose of 42 U.S.C. § 1988 is to guarantee that persons can afford to avail themselves of judicial relief.[81]

The court reasoned that "the mere filing of suit by anyone with standing to sue would have assured a full court test."[82] However, the *Thorsted* court failed to acknowledge the difference between the doctrine of standing and the concept of practical access to the court system. It cannot be argued that a case can effectively proceed on its own, without the diligence and continuing involvement of the plaintiffs and their counsel. The cost of that continuing involvement in attorney's fees may well be prohibitive for many private litigants. In a sense, statutes such as § 1983 leave the civil rights plaintiff at the courtroom door; they have helped to get the plaintiff's case into court, but the problem of cost is the litigant's alone to bear. It is precisely at this point that § 1988 is available, allowing plaintiffs to pursue the vindication that the civil rights laws offer.

The goal of § 1988 to encourage "private attorneys general" to challenge unconstitutional state action is undermined by a holding, at the close of a civil rights case, that effective access has already been afforded and a fee award is unnecessary. Effective access entails the ability to carry a challenge through to completion. Had a prevailing litigant been aware at the outset of a civil rights case that attorney's fees would be denied and he or she would be left to bear the full cost of litigation, the litigant might well have been dissuaded from even filing a claim. A policy that fees will be denied retrospectively once a claim is successful deflates the primary role of § 1988 by making the incentive of cost recovery an artificial one. As stated in the legislative history of § 1988, courts must continue to shift fees in civil rights cases if the civil rights laws are not to become meaningless pronouncements that citizens cannot afford to enforce.[83]

b. No Additional Relief Won Under § 1983

Claims brought under 42 U.S.C. § 1983 are predicated on violations by state authority of the federal Constitution or federal laws.[84] It is axiomatic that state laws that are inconsistent with the United States

81. *Id.*

82. *Thorsted*, 841 F. Supp. at 1084.

83. 1976 U.S.C.C.A.N. 5908, 5913.

84. 42 U.S.C. § 1983 (1988).

Constitution cannot stand.[85] Consequently, in every civil rights challenge to an unconstitutional state statute under § 1983, the invalidation of the law itself will be guaranteed by general rules of Constitutional law. However, the U.S. Supreme Court has recognized that the *Thorsted* scenario is common, as a large number of civil rights claimants seek only injunctive or declaratory relief.[86] The Court further recognized that awards of attorney's fees in such cases are especially important to assure judicial access because the plaintiff will not receive monetary damages to offset the cost of litigation.[87]

The need to assure practical access to judicial relief is no less real where that relief is alternatively available under the Constitution. The private litigant seeking to invalidate a law that is depriving him or her of civil rights should not care on what specific grounds that relief is afforded. The issue of prohibitive legal cost will loom just as large, whatever the final outcome. The role of §§ 1983 and 1988 in encouraging "private attorneys general" to vindicate their constitutionally guaranteed civil rights takes place at the front end of litigation, influencing the decision to file a claim. Under *Thorsted*'s reasoning, the incentive of attorney's fees will be lost in every § 1983 case that seeks relief that is also available through alternative sources. The potential exclusion of such a large body of "private attorneys general" is certainly contrary to the goals of the civil rights laws.[88]

c. The Statute Was a Voters' Initiative

The court also held that because the term limits statute was adopted through a voters' initiative, rather than being passed by the Washington state legislature, the deterrence goal of § 1983 did not apply in the *Thorsted* case. It is admittedly unlikely that a fee award assessed against the state in a particular case would deter the body of private citizens from voting for future initiatives that are of questionable constitutional validity.

It is important to reemphasize, however, that while deterrence is a central goal of § 1983, it is secondary to the goal of providing a remedy for the deprivation of civil rights.[89] The civil rights laws were originally

85. Gibbons v. Ogden, 22 U.S. 1 (1824).

86. Pulliam v. Allen, 466 U.S. 522, 527 n.4 (1984).

87. *Id.*

88. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

89. Mitchum v. Foster, 407 U.S. 225, 241 (1972).

passed to provide persons a federal remedy where state law failed to do so.[90] Where civil rights are being deprived, for the purposes of individual vindication it is irrelevant that the law is the result of a voters' initiative.[91] Diluting the deterrence effect in a particular case does not render § 1983 a dead letter, nor does it make § 1988 any less important in assuring judicial access.[92]

In addition, the fact that the particular statute in *Thorsted* was adopted by a voters' initiative does not necessarily vitiate the general deterrence goals of §§ 1983 and 1988. The deterrence effect of §§ 1983 and 1988 lies in the uniformity of civil rights enforcement, in the repeated message that every person will be empowered to challenge unconstitutional state law, that such law will not be allowed to stand, and that successful challenges will result in substantial cost in the form of attorney's fees.

d. Officials Never Enforced Statute

In denying attorney's fees, the court's reliance on the fact that the Washington Secretary of State and Attorney General had never enforced the term limits statute conflicts with its own assertion that non-enforcement is irrelevant under § 1983.[93] The weight of precedent, previously discussed, establishes that even the threat of deprivation of constitutional rights will support a claim under § 1983.[94] Thus, the issue of enforcement becomes irrelevant to the importance of a fee award under § 1988. The effective functioning of § 1983 and the assurance of judicial access depend on the granting of fees.

The court's argument may be that, as the defendant officials have not taken any personal unconstitutional action, they should not be required to assume responsibility for the acts of the State. This argument ignores the fact that suits are often brought, and fees awarded, against enforcement officials, even though there would have been no need for a lawsuit or an

---

90. *Id.*

91. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

92. The fact that the particular statute at issue in a § 1983 challenge is the result of a voters' initiative raises considerations which are beyond the scope of this Comment. Individuals must be empowered to vindicate their civil rights when those rights are infringed upon by state law, but it is open to debate whether the state as an entity should bear the cost of that vindication when private voters are responsible for the law. From a broad perspective, paying a fee award from state funds always penalizes the voting citizenry to the extent that tax revenue fills the state coffers. For the vindication of rights infringed by a state statute, regardless of its origin, this Comment assumes that the state and its voters are synonymous and the state, as an entity, will bear the cost.

93. Thorsted v. Gregoire, 841 F. Supp. 1068, 1083.

94. *See supra* notes 51–57 and accompanying text.

injunction if the state legislature had not taken unconstitutional action.[95] Enforcement officials are routinely held to answer for unconstitutional laws that they had no hand in creating.[96] The Tenth Circuit has held that failure to take official action to enforce a statute is not a special circumstance rendering a fee award unjust.[97]

As the officials responsible for implementing state law, the defendants in *Thorsted* were the representatives of the State of Washington. They were being sued in their official capacities and any attorney's fees awarded would be paid from state funds, consistent with the legislative intent behind § 1988.[98] Consequently, the State would be penalized for the enactment of an unconstitutional statute; the defendants would not assume personal responsibility in any real sense.[99]

The statement that the defendant officials' willingness to enforce the term limits statute is "only the minimum their oaths of office require" is simply an assertion that they had acted in good faith and were only performing their official duties. As will be discussed in the next section, good faith is, at best, a questionable special circumstance.

e. *State Officials Acted in Good Faith*

Six federal circuits, as well as the Washington Supreme Court, have held that the fact that state officials acted in good faith in enforcing or enacting an unconstitutional law is not a special circumstance justifying a denial of attorney's fees.[100] The Ninth Circuit has stated that good faith may be considered in applying § 1988,[101] but severely limited that

95. *In re* Kansas Cong. Dists. Reapportionment, 745 F.2d 610, 612 (10th Cir. 1984) (quoting Supreme Ct. of Va. v. Consumers Union, 446 U.S. 719, 739 (1980)).

96. *See* Finberg v. Sullivan, 555 F. Supp. 1068, 1071 (E.D. Penn. 1982) (holding that insulating enforcement officials from suit, "merely because they were complying with existing rules which they lacked the capacity to change," would frustrate the purpose of § 1988).

97. Wilson v. Stocker, 819 F.2d 943, 951 (10th Cir. 1987).

98. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government....") (citations omitted).

99. In fact, since the defendants acted in good faith, the Ninth Circuit held that they cannot be liable in their personal capacities. Teitelbaum v. Sorenson, 648 F.2d 1248, 1251 (9th Cir. 1981).

100. *See* Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980); Love v. Mayor of Cheyenne, Wyo., 620 F.2d 235, 236 (10th Cir. 1980); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); Nadeau v. Helgemoe, 581 F.2d 275, 280 (1st Cir. 1978); Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977); Jacobsen v. City of Seattle, 98 Wash. 2d 668, 676, 658 P.2d 653, 657 (1983).

101. Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979).

holding in *Teitelbaum v. Sorenson.*[102] In *Teitelbaum*, the court questioned the relevance of good faith and stated that good faith alone is not a special circumstance justifying a denial of fees.[103] State officials will presumably often act in good faith where the constitutionality of a particular law is unclear. The court in *Teitelbaum* recognized the danger of this for § 1988, reaffirming that fee awards must remain the rule rather than the exception. It stated that denying fees where a defendant acts in good faith will defeat the incentive goals of § 1988, as most defendants will be able to prove at least arguable good faith.[104]

The *Teitelbaum* court makes another argument that is noteworthy. The legislative history of § 1988 states that the statute was a response to the Supreme Court's holding in *Alyeska Pipeline Service Co. v. Wilderness Society.*[105] Despite its holding that Congress must determine under which federal legislation attorney's fees may appropriately be awarded, the Court in *Alyeska* stated that a fee award is always appropriate when the state defendant has acted in bad faith.[106] If Congress had intended that attorney's fees be awarded only where the defendant acted in bad faith, § 1988 would have been unnecessary and superfluous legislation.[107]

In order to be consistent with the holding of the Ninth Circuit, and the purpose and efficacy of § 1988, the *Thorsted* court should have rejected good faith as a special circumstance. In any event, the defendants' good faith cannot stand alone, in light of the inadequacy of the other identified special circumstances.

f. Case of First Impression

The sixth special circumstance identified by the *Thorsted* court was that the case was one of first impression in federal court, and that the defendants had done nothing to increase the cost of litigation beyond what would have been necessary to settle the issue. This argument ignores the fact that an unconstitutional state law occasioned the controversy. Absent a term limits statute that infringed the civil rights of

---

102. 648 F.2d 1248 (9th Cir. 1981).

103. *Id.* at 1250.

104. *Id.* at 1251.

105. 421 U.S. 240 (1975). *See* S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909.

106. *Alyeska*, 421 U.S. 240, 258–59.

107. *Teitelbaum*, 648 F.2d at 1250.

Washington voters and congressional candidates, there would have been no cost at all to the plaintiffs. A primary function of § 1988 is to force the state to bear the cost of its unconstitutional action.[108] As the representatives of Washington state, the defendants in *Thorsted* had to answer the plaintiffs' challenge. The state should not benefit from inventing a novel way to infringe civil rights.

The Ninth Circuit has expressed doubt that Congress intended the novelty of a claim to justify a denial of attorney's fees under § 1988.[109] To the contrary, the novelty of a civil rights claim should counsel in favor of an award of attorney's fees. In *Johnson v. Georgia Highway Express, Inc.*, the Fifth Circuit emphasized the extra effort required in cases where the law is new or unsettled and the concomitant need to attract competent counsel.[110] The court stated that the attorney in a novel case should be compensated for accepting the challenge.[111]

Encouraging private litigants to bring cases of first impression through the promise of a fee award is also consistent with the goals of §§ 1983 and 1988. The invalidation of an unconstitutional state law safeguards the rights of numerous persons by foreclosing the possibility of future state enforcement. The efforts of the private litigant in such a case may also ensure the protection of whole classes of persons by securing previously unrecognized constitutional rights.[112]

g. State Legislation Presumed Constitutional

The court's final justification for the denial of attorney's fees in *Thorsted* was that the state defendants were powerless to avoid a full trial because state legislation is presumed to be constitutional until proven otherwise. This argument would support a denial of fees in every § 1983 challenge to state legislation. In light of the number of civil rights cases brought to invalidate unconstitutional laws, this result would be contrary to the broad protective goals of §§ 1983 and 1988.

If the gravamen of the court's argument is that it is unfair to "penalize" the Secretary of State and Attorney General when they were unable to avoid prosecution, the argument must succumb to the same rebuttals already stated. Namely, the defendants in *Thorsted* were

108. 1976 U.S.C.C.A.N. 5908, 5913.

109. *Teitelbaum*, 648 F.2d at 1249.

110. 488 F.2d 714, 718 (5th Cir. 1974).

111. *Id.* at 718.

112. *Teitelbaum*, 648 F.2d at 1250.

representatives of the State of Washington, they were sued as Washington officials, and the cost of attorney's fees would fall solely and squarely on the state.

h. Contrary Authority

The *Thorsted* court dismissed authority that ran contrary to the special circumstances it had identified, stating that none of the contrary cases involved the "totality of circumstances" present in *Thorsted.* In light of the previous discussion, this argument is untenable. The special circumstances cited by the court to justify a denial of attorney's fees cannot withstand the contrary force of precedent and legislative intent. No aggregate of losing arguments should be allowed to build a winning one. Consequently, the *Thorsted* plaintiffs should have been awarded their reasonable attorney's fees under § 1988.

III. ATTORNEY'S FEES SHOULD BE UNIFORMLY AWARDED FOR § 1983 CLAIMS THAT INVALIDATE STATE LAW

The recovery of attorney's fees under § 1988 is crucial to the dual goals of § 1983 and other federal civil rights laws. Fee awards provide practical access to judicial remedies for civil rights violations. Fee awards also deter state infringement by invalidating unconstitutional legislation and establishing pecuniary penalties for state violators. In a climate of rising legal costs and expanding legislation, the role of fee recovery in private vindication and public deterrence cannot be overstated.

The value of encouraging private civil rights challenges through fee recovery is particularly compelling in cases that seek to invalidate unconstitutional state laws. An unconstitutional state statute creates the potential for widespread deprivation of individual rights. Whereas a challenge to specific state action has a limited preventive effect, by establishing legal precedent that may alter the future behavior of state officials, the invalidation of an unconstitutional statute guarantees the prevention of future deprivations of rights under that law. One "private attorney general," through a single court contest, can secure the civil rights of many persons. Consequently, the efforts of such private attorneys general must be empowered and, particularly in cases such as *Soundgarden* and *Thorsted* where only prospective relief is sought without attendant damages to offset legal costs, fee recovery is vital to that empowerment. In the future, courts should liberally recognize

challenges to state statutes under 42 U.S.C. § 1983, and where those challenges succeed, attorney's fees should be almost universally awarded.

A. 42 U.S.C. § 1983 Should Be Liberally Applied

Consistent with Congress' instructions to the courts to use the most expansive and effective remedies available to enforce the civil rights laws,[113] the courts should liberally allow challenges to state statutes under § 1983. The ability of an unconstitutional state statute to render profound and pervasive deprivations of civil rights makes effective private enforcement particularly important.

A primary purpose of § 1983 is to remedy the deprivation of civil rights.[114] Consequently, when a court considers the viability of a claim under § 1983, the crucial, and only pertinent, inquiry is whether the plaintiff's civil rights have been deprived. Actual criminal prosecution under a statute is not necessary before a person's federal constitutional or legal rights can be infringed. The U.S. Supreme Court has recognized the significant injury caused by the chilling effect that unconstitutional legislation may exert on individual rights.[115] The harmful self-censorship engendered by such a chilling presupposes a lack of official enforcement.[116] The presence or absence of state enforcement is a technical distinction collateral to the practical issue of whether a deprivation of civil rights has occurred.

When a statute chills free speech or expression and causes demonstrable and detrimental self-censorship, as was the case in *Soundgarden*, the applicability of § 1983 as a remedy is clear.[117] Courts have held that even the threat of official enforcement of an unconstitutional statute is sufficient to support a claim under § 1983.[118] This holding is presumably based on the idea, similar to the chilling theory, that a pre-enforcement statute may still exert an influence on current behavior. In *Thorsted*, for instance, the term limits statute

113. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910–11.

114. 42 U.S.C. § 1983 (1988).

115. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988).

116. *Id.* at 393.

117. *See* Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046, 1055 (5th Cir. 1985), *aff'd*, 489 U.S. 782 (1989).

118. *See In re* Kansas Cong. Dists. Reapportionment, 745 F.2d 610, 612 (10th Cir. 1984). *See also* Thorsted v. Gregoire, 841 F. Supp. 1068, 1083 (W.D. Wash. 1994).

prevented voters, campaign personnel, and potential candidates from preparing for the upcoming election, as it was unclear which candidates would be eligible to run for office. The mere existence of unconstitutional statutes may affect the acts of those to whom they apply through the threat of reprisal or prosecution. Individuals should have the right to remove that threat and its ill-effects without having to first await official actions against them.

Sound public policy dictates that § 1983 challenges should be encouraged. If such challenges successfully invalidate state law, then the litigant has served the role of "private attorney general" as envisioned by Congress and has secured the rights of all those to whom the law applies. If the challenge fails, the litigant will be forced to bear his or her own legal costs. Moreover, the precedent so established should dissuade future challenges to the incident law which are of the same or a similar nature and dissipate any doubts as to the validity of the statute in question. Furthermore, § 1983 itself discourages frivolous suits by allowing an award of attorney's fees against a party that files or prosecutes a civil rights claim in bad faith.[119] In light of the importance of the civil rights laws, the crucial role of private enforcement in their vindication, and the particularly harmful nature of unconstitutional statutes, challenges to those statutes under 42 U.S.C. § 1983 should be almost universally allowed.

B. Fee Awards Should Rarely Be Denied Under 42 U.S.C. § 1988

Once a plaintiff has successfully challenged an unconstitutional state law under § 1983, the fee award analysis under § 1988 is greatly simplified. If a litigant successfully invalidates a state statute, an award of attorney's fees should rarely be denied.

In order to qualify as a prevailing party under § 1983, and be eligible for a fee award under § 1988, a civil rights plaintiff must alter the legal relationship between the parties, and modify the defendant's behavior in a manner that is directly beneficial to the plaintiff at the time of judgment.[120] The invalidation of a state statute alters the legal relationship between the plaintiff and defendant and modifies the defendant's behavior by removing a source of state authority and foreclosing the option of prosecution or reprisal based on that authority. Assuming a deprivation of rights sufficient to support the claim under

119. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

120. Farrar v. Hobby, 113 S. Ct. 566, 573 (1992).

§ 1983, the invalidation of the statute will necessarily benefit the plaintiff by removing the cause of that deprivation. Consequently, when a state statute is declared unconstitutional under 42 U.S.C. § 1983, the plaintiffs have prevailed within the meaning of § 1988.

Once prevailing party status is established, all that remains to justify a denial of a fee award is the issue of special circumstances which would render an award unjust. It must serve as a backdrop to this inquiry that Congress and the courts have repeatedly affirmed that attorney's fee awards must remain the rule rather than the exception if federal civil rights laws are to be more than hollow pronouncements that citizens cannot afford to enforce.[121] In cases such as *Soundgarden* and *Thorsted*, where private litigants have challenged and invalidated unconstitutional state laws, the special circumstances inquiry should also include certain additional considerations.

In cases successfully challenging state law, the special circumstances analysis should not focus on the state defendants. If a plaintiff has prevailed under § 1983 and secured the invalidation of a state statute, it follows that a civil rights infringement has already occurred and the goal of deterrence has failed. The state has an opportunity to avoid the enactment of unconstitutional laws. State legislatures have the means to obtain staff legal review regarding proposed legislation and should do so to narrow the possibility of passing statutes which are repugnant to the federal constitution or laws. Moreover, those who propose voters' initiatives should be held to a similar standard and not be permitted to entertain the fiction that the will of the people may sanction unconstitutional action. If a civil rights suit nonetheless arises, the state has a second chance under § 1983 to show that the law at issue is not, in fact, causing a deprivation of civil rights.

If the issue of special circumstances under § 1988 has been reached in a particular statutory challenge, it presupposes that a civil rights deprivation has occurred as a result of state law. This fact alone is sufficient to trigger the plaintiff's right to a remedy under § 1983 and attorney's fees are a crucial component of that remedy. Fee award analysis that focuses on the state at this point is misplaced; the state had opportunities to both avoid and defend its actions, and an infringement of civil rights has nonetheless been found to exist. Analysis that focuses on defendant enforcement officials is similarly misplaced, as such officials are merely conduits through whom the state is held accountable. There

121. *See* 1976 U.S.C.C.A.N. 5908, 5913. *See also* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

will be instances where even the most diligent good faith efforts of a state legislature or voters' coalition result in the passage of an unconstitutional law. However, once a deprivation of civil rights occurs, the cost of vindicating those rights must be borne by the state.

Where a state statute has been successfully challenged, therefore, the special circumstances analysis should focus on the plaintiff. An appropriate inquiry would be the necessity of a fee award to assure judicial access to the plaintiff or plaintiffs in question. The *Soundgarden* case provides a good example. A number of the *Soundgarden* plaintiffs were successful artists with lucrative recording careers who could presumably have absorbed the cost of litigation. Furthermore, even absent the possibility of a fee recovery, those plaintiffs would likely have brought suit, as the statute at issue was significantly impacting their livelihood. It could be argued that, under the circumstances, a fee recovery was unnecessary to either encourage or empower the specific civil rights challenge.

However, a plaintiff's economic autonomy alone should not support a fee denial. The party whose civil rights have been injured should not be required to bear the cost of remedy simply because he or she has the means. A basic tenet of § 1988 is that "those who violate the Nation's fundamental laws are not to proceed with impunity."[122] States must bear the cost of successful challenges to state law. Such accountability serves to punish the unconstitutional action at issue, to deter future action through the threat of monetary penalty, and to encourage civil rights challenges. The fact that a particular plaintiff can afford to pay attorney's fees does not vitiate either the incentive or deterrence goals of § 1988. Civil rights litigants must be encouraged to vindicate federal rights without being concerned that their income may cross some unknown threshold and render them ineligible for a fee award. More importantly, state legislatures should not receive the message that they may legislate with impunity when their legislation targets only affluent entities or segments of society.

A plaintiff's ability to bear his or her own legal costs should only support a denial of attorney's fees if other special circumstances exist as well. In situations where a fee award was not crucial to provide a plaintiff judicial access, it would be relevant that the deterrence effect of an award was also diluted. Under those circumstances, the fact that the statute was adopted by voters' initiative, as was the case in *Thorsted*, would be a viable special circumstance, due to the difficulty of sending

122. 1976 U.S.C.C.A.N. 5908, 5910.

deterring messages to a body of private voters. Other specific elements of a case that tended to render the deterrence goal of a fee award ineffective or impossible would be relevant to the special circumstances analysis.

The relative magnitude of the civil rights deprivation would be relevant as well. A court could determine that a particular plaintiff, rather than the state through its taxpayers, should bear the cost of vindicating relatively trivial civil rights deprivations. This special circumstance would be closely related to the scenario described in the legislative history of § 1988 regarding the plaintiff who litigates in bad faith.[123] While Congress has authorized a court to require such a litigant to bear the defendant's legal costs,[124] incorporating the "frivolous" nature of the suit into the special circumstances analysis provides the court with some middle ground. If a particular civil rights litigant has not demonstrated bad faith per se but is nonetheless attempting to remedy a deprivation of rights that is insignificant or impacts few other persons, the court could consider such a circumstance as counseling against a fee award. The court could thereby express its disapproval for a litigant's misuse of judicial resources without taking the decidedly harsh step of shifting the defendant's costs to a party that has, technically, prevailed.

If the fundamental goals of access and deterrence cannot be furthered by a fee award in a particular case and the suit borders on the frivolous, then the good faith of the defendant may be pertinent to the special circumstances inquiry. As discussed, the good faith of the defendant should not be a primary special circumstance in successful statutory challenges under § 1983. However, when the ability to achieve the basic goals of the civil rights laws and the plaintiff's good faith are both suspect, the defendant's good faith efforts would be a proper final factor justifying a denial of attorney's fees.

Good faith in this context must include more than an honest belief in the constitutionality of the specific statute or simple adherence to official enforcement duties. The state should be required to demonstrate that it took substantial steps prior to the passage of the offending legislation to ensure its constitutionality. These steps should certainly include legal consultation with staff attorneys or outside counsel and research into the relevant legal policy and precedent. It would also be appropriate to require the state to provide some opportunity for public input to allow community experts or interest groups to be heard on the legal and

123. *Id.* at 5912.

124. *Id.*

practical consequences of the proposed law. The state should be compelled to show that it actively considered the constitutionality of the statute and took reasonable measures to avoid offending the federal constitution or laws.

Only in the most extreme cases should special circumstances surrounding the invalidation of a state law under § 1983 render an award of attorney's fees unjust. As an initial matter, it should be functionally impossible to advance the basic goals of § 1983, namely effective access to judicial remedy and deterrence of future deprivations, through a fee award. In addition, the plaintiffs should be shown to have litigated in questionable faith in seeking a remedy for a relatively trivial infringement of civil rights. Lastly, the state defendants should be required to demonstrate good faith, consisting not merely of honest dealing but of affirmative efforts to avoid enacting an unconstitutional law. Only if all of these elements exist should the inequity of fee recovery countermand the broad policy of empowering "private attorneys general."

IV. CONCLUSION

Attorney's fees should rarely be denied in cases where unconstitutional state laws have been invalidated under 42 U.S.C. § 1983. A court's discretion to deny fees is, in all civil rights cases, very narrow, and it is narrowed further by the nature of challenges to state statutes. Unconstitutional statutes can exert pervasive influence on civil rights without a single prosecution, and private challenges to those statutes safeguard the rights of everyone to whom the law applies. The *Soundgarden* and *Thorsted* cases are examples of plaintiffs serving the role of "private attorneys general" and putting teeth into federal civil rights legislation. Courts in Washington, and nationwide, must honor the intent of Congress by liberally facilitating and rewarding that effort.